IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-289

PRUNEYARD SHOPPING CENTER, et al.,

Appellants,

—v.—

MICHAEL ROBINS, et al.,

Appellees.

ON APPEAL FROM THE CALIFORNIA SUPREME COURT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, THE ACLU FOUNDATION OF SOUTHERN CALIFORNIA, AND THE AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

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Interest of Amici

The American Civil Liberties Union of Northern California and the ACLU Foundation of Southern California are the California regional affiliates of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan membership organization dedicated to the defense and preservation of the individual rights guaranteed by the state and federal constitutions. Since its inception, this organization has been especially concerned

with the constitutional right of expression, and committed to preserving the greatest opportunity for wide dissemination of constitutionally-protected ideas. In pursuit of this goal, the ACLU has participated in numerous cases, including the present case, involving the right to circulate petitions where people live, work, and shop.

The present case involves California's right to safeguard constitutional rights of freedom of expression and petition under its own constitution, and to define state property rights so as to preserve a greater scope for public expression than the federal Constitution requires. The ACLU and its California affiliates therefore submit this brief in the hope that it will substantially assist the Court in resolving the constitutional questions raised by petitioners, questions we view as frankly unsubstantial.

Counsel for Appellants and Appellees have consented to the filing of this brief. The letters of consent have been filed with the Clerk of this Court.

Statement Of The Case

The decision by the California Supreme Court below held that it is a fundamental right of individuals in California, guaranteed by their own state constitution, to communicate freely on matters of public concern in the open areas of a suburban shopping center. Appellants' effort to reverse that decision jeopardizes the most basic of a State's rights: to define through state property laws and constitutional provisions the proper accommodation between civil rights of individuals and owners of commercial property.

Plaintiff-Appellees were Santa Clara County high school students and their religious school teacher who, concerned by a United Nations resolution against Zionism, attempted one weekend afternoon to obtain signatures on a petition opposing the resolution in the mall area of the Pruneyard Shopping Center, located in suburban Santa Clara County. Although these children confined their efforts to a cardtable in the corner of the mall, were orderly and peaceful, and did not interfere with shopping

center activities, they were directed to leave by the Pruneyard's security officers. Their efforts to obtain injunctive relief, denied in the lower courts, were ultimately upheld by the California Supreme Court.

Recognizing this Court's holding in Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), that similar (i.e., leafletting) activity in a Portland, Oregon shopping center was not protected by the First Amendment, Appellees and this Amicus argued, and the California Supreme Court held, that under California property laws and the more expansive language of the California free speech guarantee, Appellees could lawfully engage in their activity on the Pruneyard property. Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (1979).

Introduction and Summary of Argument

Critical to an understanding of the jurisdictional and substantive issues raised by this appeal is what this case involves and what it does not involve, distinctions which Appellants blur or fail to

acknowledge. The case does not involve private residential property, nor any other property held for the private use of its owners, nor property held for the private use of fee-paying members. Rather, the case involves a 21-acre suburban center of 65 shops, 10 restaurants, walkways, plazas, and a cinema, all held open to the public at large.

The case does not involve any interference with the primary uses intended for that property. Appellees sought merely to communicate with other visitors to the mall in the open, congregating area of the mall. Moreover, the decision below does not involve an interpretation of First Amendment protection for Appellees' activity. Rather, the case involves an interpretation by the highest court of California of state property law, as well as state constitutional provisions protecting freedom of speech and petitioning for governmental redress of grievances. Points IA and IB.

It does not involve a "taking" within the meaning of the Taking Clause of the Fifth Amendment as applied through the Fourteenth Amendment. Appellants apparently

concede this fact (Appellants' Br. at 11 n.4), as they must, because case law is soundly to the contrary, and because there was neither an affirmative defense nor a record nor a finding below that Appellees' peaceable use of a cardtable to solicit signatures on a petition to the Government constituted a taking, with or without the state action required by the Fifth and Fourteenth Amendments. Point IC. Additionally, although Appellants claim that the decision below violates their substantive due process rights protected by the Fourteenth Amendment, they fail to clarify that this claim involves due process in the context of economic regulation for the public good. Point ID.

ARGUMENT

I. NO SUBSTANTIAL FEDERAL QUESTION UNDER THE FIFTH AMENDMENT IS RAISED BY THE DECISION BELOW.

A. The California Supreme Court's Decision Consists Of An Interpretation Of State Property Interests And State Constitutional Rights Of Free Speech.

The decision below was two-pronged, interpreting both California free speech rights and California property rights. The California Supreme Court expressed its free speech holding as follows:

> In this appeal from a judgement denying an injunction we hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution.
>
> 23 Cal.3d at 902.

With respect to the property interests at issue, the Court further held that under California law, "[m]embers of the public

are rightfully on Pruneyard premises because the premises are open to the public during shopping hours." Id. at 905.

1. The California Constitutional Free Speech Guarantee Protects Appellees' Activity

The Court below determined that California's free speech guarantee, Article 1 Section 2, is broader than the First Amendment, and that it protects the free speech efforts of Appellants at the Pruneyard. The power to fashion safeguards for the civil rights of a State's own citizens that are more protective than the minimum standards of the federal Constitution has long been recognized by this Court. See, e.g., Cooper v. California, 386 U.S. 58, 62 (1967). See generally Brennan, "State Constitutions and the Protection of Individual Rights", 90 Harv. L.Rev. 489 (1977).

Unsatisfied with only the terse, negative mandate of the First Amendment, California adopted more expansive language, assuring Californians the additional

affirmative right that:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right . . . .
>
> California Constitution, Article 1, §2.

Beginning as early as 1896, the California Supreme Court has consistently interpreted this provision as guaranteeing broader protection than the First Amendment, ruling that the California right to free speech is virtually "unlimited,"[1/] "uninhibited,"[2/] "viewed with great solicitude," [3/] "among the most precious of our citizenry,"[4/]. Significantly, the Court has held that Article 1 Section 2 not only guarantees individuals the "right to air their beliefs, [but also] society [the] right to hear them."[5/]

1/ Dailey v. Superior Court, 112 Cal. 94, 96-98 (1896).
2/ Wilson v. Superior Court, 13 Cal.3d 652, 658 (1975).
3/ Wilson v. Superior Court, supra.
4/ Jacoby v. State Bar, 19 Cal.3d 359, 380 (1977).
5/ Id. at 368.

Owners of California property held open to the public at large have long known that California policy requires that their property accommodate the expression of beliefs on public issues, subject to reasonable restrictions prohibiting interference with the property's primary use. E.g., Diamond v. Bland, 3 Cal.3d 653 (1970); In Re Lane, 71 Cal.2d 872 (1969); In Re Hoffman, 67 Cal.2d 845 (1967); Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, 61 Cal.2d 766 (1964); see In Re Cox, 3 Cal.3d 205 (1970).

In Diamond, a case involving a shopping center, the Court concluded on the basis of its own precedent:

> "It is immaterial that another forum, equally effective, may have been available to petitioners . . . . Absent the presence of some conflicting interest that could be protected in no other way, petitioners have the right to choose their own forum."
>
> 3 Cal.3d at 664, quoting In Re Hoffman, supra, 67 Cal.2d at 852 n.7 (the holding in Diamond, on First Amendment grounds, was subsequently reversed under the authority of Lloyd Corp. v. Tanner, supra.)

Although certain of these decisions were based on the First Amendment, they nevertheless express California's clear policy that freedom of speech encompasses the right to communicate ideas in suburban communities by seeking out citizens in the mall areas of shopping centers.

Following this established and consistent trend, the California Supreme Court in Pruneyard merely held, on the facts of this case, that the state constitution guarantees the right in California peaceably to petition for signatures, under reasonable restrictions, on the grounds of a suburban shopping center mall held open to the public, a question that had earlier been reserved. Diamond v. Bland II, 11 Cal.3d 331 (1974).

2. California Property Law Does Not Give Appellants The Right To Exclude Appellees.

Of course, in reaching this interpretation of the state constitutional guarantee, the court had to consider the Pruneyard's property interests. Again,

however, this was a question of state, not federal, law. In a series of cases this Court has ruled that "[p]roperty interests . . . are not created by the Constitution." Board of Regents v. Roth, 408 U.S. 564, 577 (1972)(emphasis in original). Accord, Flagg Bros., Inc. v. Brooks, 436 U.S.149, 160 n.10 (1978); Bishop v. Wood, 426 U.S. 341, 344 (1976); United States v. Willow River Power, 324 U.S. 499 (1944). Rather, this Court has insisted that states possess the fundamental power to define what constitutes that "bundle of rights" that is property.

In the decision below, California has merely defined the incidents of ownership of certain real property to permit the conduct of expressive activity which does not interfere with the real property's principal economic use. Such a definition of the substantive scope of the incidents of ownership of California realty lies comfortably within Bishop v. Wood's recognition of state power. Accordingly, unless appellants can point to a source of Federal law vesting them with a property

right more extensive than the rights recognized by the California Supreme Court, no Federal question exists in this case.[6/]

B. Lloyd v. Tanner Does Not Provide Appellants With A Federal Source of Law Creating The Property Right They Assert.

Appellants argue that in deciding Lloyd v. Tanner, this Court recognized the existence of a supervening federal property right which must override California's attempt to define its property interests less expansively. However, Appellants seriously misread Lloyd. As the Court noted in Lloyd, where state law recognizes certain incidents of ownership, the Fifth and Fourteenth Amendments act to prevent the erosion of such "property" rights.[7/]

6/ This Court is, of course, bound by the California Supreme Court's definition of the meaning of California property law. Oregon v. Hass, 420 U.S. 714, 719 (1975).

7/ Lloyd is, thus, entirely consistent with the Board of Regents v. Roth, 407 U.S. 564 (1972) decided during the same term.

Lloyd does not, however, stand for the proposition that the federal constitution itself creates substantive property rights independently of state law.[8/]

In Lloyd, a group of protestors secured an injunction prohibiting a shopping center in Portland, Oregon from interfering with their distrubtion of handbills in the shopping center mall. Reversing the lower courts' conclusion that the center was "the functional equivalent of a business district" and that the protestors' activity was therefore protected by the First Amendment, the Supreme Court halted the increasing trend, reflected in Marsh v. Alabama, 326 U.S. 501 (1946) and Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968) to find private property to be sufficiently "public" in character - the "public function" analysis - to satisfy the state action

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8/ Any attempt to read Lloyd as recognizing the Fifth and Fourteenth Amendments as independent sources of substantive property rights runs headlong into Board of Regents v. Roth, Bishop v. Wood, and Flagg Bros., Inc. v. Brooks, supra.

requirement of the First Amendment.[9/] Distinguishing Marsh on the ground that its holding was applicable only to cases in which "private interests were substituting for and performing the customary functions of government" 407 U.S. at 562, the Court rejected the respondents' contention that the First Amendment required treating the shopping center as a public forum:

> Respondents contend . . . that the property of a large shopping center is "open to the public," serves the same purposes as a business district" of a municipality, and therefore has been dedicated to certain types of public use . . . . It is then

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9/ Marsh v. Alabama, which the Lloyd Court distinguished, was a state action case originating the "public function" theory of state action. See generally Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157, 158 (1978); Evans v. Newton, 382 U.S. 296, 299, 302 (1966)("Conduct that is formally "private" may become . . . so impregnated with a governmental character as to become subject to the constitutional limitations on state action . . . . Like the streets of the company town in Marsh, . . . this park . . . should be treated as a public institution . . . regardless of who now has title under state law.").

asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use.... Marsh v. Alabama, supra, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner . . . stood in the shoes of the State.

Id. at 568-69 (footnote omitted, emphasis supplied).

The Lloyd Court did not hold that the shopping center owner's rights would be violated - that is, that there would be a deprivation of property without due process or a "taking" without compensation - if the free speech activity were allowed.

Although the Court commented on the "relevance of" the Due Process Clause, it did so solely to emphasize the general importance of private property in the context of state action. Id. at 567. Indeed, the actual holding in Lloyd does not mention the purported constitutional rights of the owner, focusing instead on the absence of state action:

> We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.
>
> Id. at 570.

C. The Decision Below Results In No Violation Of Any Federally-Protected Property Rights.

Apart from their misplaced reliance on Lloyd, Appellants argue generally that the decision below violates rights "rooted in" the Fifth and Fourteenth Amendments (Appellants' Br. at 10), and that these rights grant the shopping center owner the absolute power to exclude anyone who does not meet the "owner's desires." (Appellants' Br. at 11.) But, as set forth above, the

Fifth and Fourteenth Amendments do not create or define property rights.

To invoke the protection of the Fifth and Fourteenth Amendments - and this Court's jurisdiction - the decision below upholding Appellees' right to use a cardtable to seek signatures for a petition must have constituted either an uncompensated "taking" of the Pruneyard's property by the government or a denial by the government of due process as that concept has been defined in the context of economic regulation.[10] Appellants and Amici in their support conspicuously avoid any analysis of their claim, as well as any discussion of this Court's opinions defining these asserted rights.

10/ The Court can reject Appellants' Fifth and Fourteenth Amendment claims at the outset if it holds, as in Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 155-157, 164-166 (1978), that Appellees' alleged invasion of Appellants' rights is not governmental action. Here, as in Flagg Brothers, no Constitutional rights have been violated since only private parties, not state actors, have engaged in allegedly offensive conduct. Id. at 156-157. Here, as in Flagg Brothers, Appellees should look to state law, not Constitutional law, for relief from private activity, if any.

Because a violation of either the taking or substantive due process clauses would be the only basis for reversal of the decision below, and because a holding that such a violation occurred here could jeopardize enforcement of federal and state civil rights and public accommodations laws as discussed below, the alleged violation of these two rights must be carefully analyzed. As revealed by that analysis below, Appellants' argument fails.

1. Appellees' Use of a Cardtable in a Corner of the Pruneyard Mall to Obtain Signatures on a Petition Does Not Constitute a "Taking" by the State Without Just Compensation.

Given Appellants' concession that this is not a condemnation case (Appellants' Br. at 11 n.4), no discussion of the taking clause would seem necessary. However, Appellants nonetheless argue that the decision below violates property rights "rooted" in that clause.

Penn Central Transport Co. v. New York, 438 U.S. 104 (1978), pointedly missing from all of the briefs in support of Appellants,

is the Court's most recent, comprehensive interpretation of the Taking Clause. As carefully explained in that case, whether a particular regulation constitutes either a permissible, noncompensable exercise of police power or a taking requiring compensation "depends largely 'upon the particular circumstances [of each] case,'" requiring a determination of the public purpose served by the restriction and "factual inquiries" into the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations." Id. at 124, 126-27 (citations omitted). The necessity of this inquiry was recently reaffirmed in Kaiser Aetna v. United States, U.S. 48 U.S.L.W. 4045, 4048 (1979)(discussed below).

Appellants failed to develop the requisite record below; they failed even to raise an affirmative defense to the complaint on the grounds of a taking or a denial of due process, or any other ground. (See Answer to Complaint, Appellants' Appendix at 10-11). This lack of record

necessary for a taking violation claim requires dismissal of the argument that they have been deprived of "property." See Goldblatt v. Hempstead, 369 U.S. 590 (1962), cited with approval in Penn Central, supra, 438 U.S. at 126-27 (assumption that ordinance "did not prevent reasonable use of property since the owner made no showing of an adverse effect on the value of the land.").

It is apparent why such a record was not attempted. Even if Appellants had tried to show that Appellees' activity somehow diminished the economic value of the Pruneyard, the Supreme Court held in the Penn Central case that a deprivation of an owner's most profitable use of property or a mere diminution in property values - in that case, several million dollars a year - does not constitute a taking. At issue in the Penn Central case was a New York law enacted to preserve historic landmarks which impeded the owner of New York's Grand Central Terminal from constructing an addition to the terminal. The Court upheld the law as a valid exercise of

police power for public aesthetic goals and, therefore, not a taking of property rights requiring compensation. The Court observed:

> [T]he submission that appellants may establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.
>
> Id. at 130.

The Court in Penn Central canvassed numerous other decisions which deemed "taking" challenges without merit where governmental action, for example (1) prohibited a beneficial use to which property had previously been devoted causing substantial harm (see cases cited Id. at 126-27); or (2) significantly diminished property values (e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)[75% diminution], Hadacheck v. Sebastian, 239 U.S. 394 (1915) [87 1/2% diminution]). The "taking" challenge in Penn Central was rejected even though, as noted in the dissent, the state law not only prohibited a beneficial use, but imposed an affirmative duty to maintain

the property in a certain way. 438 U.S. at 145-47 (Rehnquist, J., dissenting).

United States v. Causby, 328 U.S. 256 (1946), which Appellants off-handedly cite to support their claim of a compensable "right to exclude" (Appellants' Br. at 11 n.4), was soundly distinguished in Penn Central. In Causby, the owner's air rights were being physically invaded by repeated flights of government airplanes. The Court in Penn Central observed:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, see, e.g., United States v. Causby, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefit and burdens of economic life to promote the common good.
>
> 438 U.S. at 124.

It is just such an adjustment for the common good that the decision below effectuated. Appellants' property is hardly "invaded" when it is already open to the public at large.

This "adjustment for the public good" concept was even more recently reaffirmed in Andrus v. Allard, U.S. 48 U.S.L.W. 4013, 4017 (1979), which is also surprisingly missing from all of the briefs in support of Appellants. The Court in Andrus rejected the argument that the retroactive application of the federal Eagle Protection Act (prohibiting commercial transactions in eagle feathers) to pre-existing artifacts utilizing such feathers constituted a "taking." Id. at 4017. The Court explained:

> To require compensation in all such circumstances [where "adjustment for the public good" curtails the use or economic exploitation of property] would effectively compel the government to regulate by purchase. Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . . .
>
> . . .
>
> It is true that appellees must bear the cost of these regulations. But, within limits, that is a burden borne to secure "the advantage of living and doing

> business in a civilized community."
>
> Id. at 4017, quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 422 (1922).

In any event, whatever interference might otherwise be caused Appellants by allowing free speech activity on the Pruneyard can unquestionably be contained under California law by the imposition of reasonable time, place and manner restrictions limiting such interference. In Re Hoffman, supra, 67 Cal.2d at 850. As in Penn Central, these restrictions, such as confining the activity to a designated spot, would allow Appellants:

> to use the remainder of the parcel in a more gainful fashion. This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting [certain uses] . . . .
>
> 438 U.S. at 135.

The foregoing analysis of this Court's "taking" cases demonstrates that, as Appellants seem to concede, there has not been a "taking" (or, in Appellants' words,

a "condemnation", Appellants' Br. at 11, n.4) and consequently that the right guaranteed by the Taking Clause has not been violated. If there has not been a "taking" of property, Appellants have no Constitutional claim for deprivation of their property. Appellants nonetheless seem to argue that the owner of a publicly open shopping center has a "right to exclude" persons not meeting the "owners' desires" which the government may not diminish without compensation, although again Appellants do not claim a right to compensation. (Appellants' Br. at 11-12). Appellants rely exclusively on Kaiser Aetna v. United States, supra,[11/] while evidently avoiding any claim that Kaiser Aetna controls the outcome of this case or that compensation is required. Appellants also ignore, for obvious reasons, the language in Kaiser Aetna that the "taking question" requires "factual inquiries . . . [of] the economic impact of the regulation [and] its interference with reasonable investment backed expectations . . . ." 48 U.S.L.W. at 4048.

11/ Appellants additionally cite other cases at page 11 of their brief, all of which involved the right of homeowners, not owners of public accommodations, to preserve the privacy of their homes from commercial peddlers.

It is quickly apparent from a reading of Kaiser Aetna why Appellants shy away from a claim that the decision is controlling. Kaiser Aetna involved the conversion of a privately-owned and used pond and channel into a privately owned and privately-used marina, open only to fee-paying members of the marina. The fees were paid in part "to maintain the privacy and security of the pond." Id. at 4046. The action arose because the federal government sought to compel free public use of this privately-owned and used marina for recreational and commercial purposes on the ground that the widening of the channel had rendered the channel navigable waters under the government's jurisdiction. The Court upheld Kaiser Aetna, finding that an "expectancy" in continued private use of the channel and marina had been created by the express, unconditioned consent given by the federal government to dredge the channel. Id. at 4049. Unlike the present case, then, Kaiser Aetna involved neither property held open to the public nor a regulation leaving the economic purpose of the property substantially intact. Rather it involved a government

deprivation of the very essence of the property owner's interest.

The Pruneyard also relies on a 50-year-old case, Delaware, Lackawanna & Western R.R. Co. v. Town of Morristown, 276 U.S. 182 (1928), which invalidated under the taking clause an ordinance which established taxicab stands on the premises of a privately-owned railroad station. It is questionable whether this somewhat dated case would be resolved the same way today in view of recent cases such as Penn Central. In any event, however, the case involved an interference with a core use of the property for another party's commercial exploitation. Appellants have not even attempted to argue that the peaceable use of a cardtable for political petitions substantially interferes with the commercial use of the Pruneyard. Rather, Appellants apparently argue an absolute right to exclude which cannot be restricted in any degree without constituting an unconstitutional taking.

This asserted "right to exclude" has never been recognized in the context of public accommodations, or compensation would have been required for deprivation of a "property" right

to exclude Blacks. If it had, a substantial body of federal and state civil rights legislation would fall. In an article addressing the mid-60's efforts of property owners lobbying against civil rights legislation on the basis of a property right to exclude, Professor Richard Powell observed:

> If one looks far enough backward it could fairly be said that the "he who owns, may do as he pleases with what he owns."
>
> Powell, "The Relationship Between Property Rights and Civil Rights," 15 Hast. L.J. 135, 139 (1963).

But, he explained, society advances; the concept of property "is not absolute, but is a system of rights and duties that are determined by society." Id. (citation omitted). Reviewing in detail the growing restrictions on the use of property permissible under the police power, Professor Powell summarized:

> All of these qualifications upon the completeness of property rights have come into our law because of an increased recognition of society's stake in the law of property.

> . . . The otherwise existent power to make uses of land . . . has been kept within limits because of the requirements of social welfare.
>
> . . . .
>
> [C]ourts have repeatedly assert[ed] that "property rights" are, and always have been, held subject to the "police power"; that is, the power of the government to do that for which it exists, namely, to impose restrictions (without compensation to the owner) upon property owners, whenever such restrictions serve the . . . general welfare of the governed group.
>
> . . . .
>
> [T]he governmental police power requires that the liberty of a landowner be curtailed so as to assure the longer liberties of other human beings.
>
> . . . .
>
> Property rights have been redefined in response to a swelling demand that Ownership be responsible and responsive to the needs of

> the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the . . . welfare of others.

Id. at 142, 143, 144, 149-50.

In summary, the Fifth Amendment Taking Clause does not create or define property rights. The "property right" quaranteed by the Taking Clause is solely the right to be paid compensation when the state-defined property right is "taken" by the government within the meaning of that clause.

Under California property law, as discussed in Point I above, Appellant's property rights do not include the right to exclude peaceful, expressive petitioning activity during business hours, but only to **regulate** it. Under this Court's decisions interpreting the Taking Clause, therefore, which Appellants and their supporting Amici fail to address, there has been no "taking."

2. Protection of Appellees' Free Speech Rights, Subject to Reasonable Restrictions, Does Not Deprive Appellants of Property Without Substantive Due Process.

In apparent recognition that Lloyd

is not controlling and that there has not been a "taking" of Pruneyard's property by the state without just compensation, Appellants contend that the decision below nevertheless violates Appellants' rights to substantive due process under the Fifth and Fourteenth Amendments. Analysis of this claim must take into account, as Appellants do not, that economic regulation is at issue, and that this Court has not invalidated any state regulation of economic policy for violation of substantive due process since Thompson v. Consolidated Gas Co., 300 U.S. 55 (1937), decided 42 years ago.

The trend away from invalidating laws as violative of economic due process, followed as recently as 1978 in Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (statute upheld prohibiting petroleum refiners from operating retail service stations in state), began with Nebbia v. New York, 291 U.S. 502 (1934)(conviction of selling milk below state-fixed price upheld), in which this Court announced:

> [Neither] property rights nor contract rights are absolute; . . . . Equally fundamental with the private right is that of the

> public to regulate it in the common interest . . . .
>
> [T]he guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be attained.

Id. at 523, 525.

In Railway Express Agency v. New York, 336 U.S. 106 (1949), involving a city ordinance prohibiting advertising on vehicles, this Court rejected a carrier's substantive due process claim, similar to the Pruneyard's, that it had a right to use its property as it wished.

The power of the state to regulate economic activity specifically for the protection of civil rights, as in the decision below, was upheld against a substantive due process claim in Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). In refusing to invalidate a law requiring employers to allow employees

time off with pay so that they could vote, the Court concluded:

> [T]he police power is not confined to a narrow category; it extends . . . to all the great public needs. The protection of the right of suffrage under our scheme of things is basic and fundamental . . . . [M]any forms of regulation reduce the net return of the enterprise; yet that gives rise to no constitutional infirmity. Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization . . . .
>
> Id. at 424.

Day Brite, involving the right to vote, surely controls here where the fundamental right of free speech is at stake.

Finally, Appellants' specific claim of a "right to exclude" protected by the Due Process Clause, for which Appellants have not cited any applicable authority, 12/

12/While it is not clear whether Appellants rely on the Kaiser Aetna case to support a violation of the Taking Clause or a violation of economic substantive due process, the decision was based solely on the Taking
(footnote cont'd next page)

was specifically rejected by this Court over a decade ago in Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964), when restaurant owners had claimed a constitutional right to exclude Blacks.

Moreover, if Appellants' contentions are correct, then this Court's decision in Eastex, Inc. v. NLRB, 437 U.S. 556 (1978), would have required compensation for the property right invaded by the leafletters

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(footnote cont'd from previous page)

Clause. Moore v. City of East Cleveland, 431 U.S. 494 (1977), on which Appellants also rely, is not an economic substantive due process case. It involved residential housing and a homeowner's conviction under an ordinance limiting occupancy to members of one's immediate family. As the Court carefully noted, the ordinance intruded on the constitutionally-protected "'private realm of family life'." 431 U.S. at 499, quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1955).

in that case. In Eastex the Court was faced with the right of workers under the National Labor Relations Act to distribute union newsletters during nonworking hours in nonworking areas of the employer's property, where the newsletter did not seek action by the employer and involved matters over which the employer had no control. Id. at 572. Otherwise stated, at issue was the permissibility of a physical entrance onto privately-owned property, as in this case, by private individuals authorized by the government, as in this case, for purposes other than that intended by the owner, as in this case. Significantly, the property invaded in that case was not open to the public, as in this case, but rather was a corridor in a manufacturing plant leading to the employer's time clocks. In upholding the right of the workers to engage in that leafletting, the Court rejected the employer's contention that where there was no showing that alternative means of communication were unavailable, the activity violated the owner's property rights. Id.

The Court has frequently emphasized that

"[t]he burden should rest heavily upon one who would persuade [this Court] to use the due process clause to strike down a substantive law or ordinance." Railway Express Agency v. New York, supra, 336 U.S. at 112 (Jackson, J., concurring). Appellants, who never raised economic due process as an affirmative defense in the trial court below and have failed to cite any pertinent economic substantive due process decisions, have failed to meet that burden.

II. APPELLEES' EXERCISE OF THEIR FREE SPEECH RIGHTS DOES NOT VIOLATE APPELLANTS' ASSERTED FIRST AMENDMENT RIGHT TO REMAIN SILENT.

Appellants assert for the first time in this appeal that to safeguard Appellees' free speech rights violates their asserted First Amendment "right to remain silent." (Appellant's Br. at 13.) In support of this rather startling contention, Appellants cite this Court's decisions in West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943), Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) and Wooley v.

Maynard, 430 U.S. 705 (1977). Appellants' reliance on these cases, however, is misplaced; not only is each of them factually distinguishable, the express language of each case compels the conclusion that, whatever protection the First Amendment may afford to refrain from speaking in some instances, such protection does not apply here.

In Barnette, this Court held that public school students could not be compelled to participate in the pledge of allegiance to the United States flag, since to do so would constitute a "compulsion of students to declare a belief." 319 U.S. at 631. As the opinion makes clear, the constitutional infirmity of such a requirement is that it "requires the individual to communicate by word and sign his acceptance" of a government-dictated set of political ideas (Id. at 633), whether or not he subscribes to such views. Such compulsion cannot be tolerated, since no individual can, consistent with the United States Constitution, be forced to "confess by word or act" his

belief in any state-prescribed idea. Id. at 642.

Similarly, in Wooley, a state statute requiring owners of noncommercial vehicles to display license plates bearing the state motto "Live Free or Die" was held to be violative of the First Amendment, since the effect of the statute was to compel the individual to disseminate a state-imposed ideological message. 430 U.S. at 173. As in Barnette, the Court held that the state's interest in espousing a particular ideology must be subordinated to the First Amendment rights of those who choose not to be "the courier for such message." Id. at 717.

As these two decisions demonstrate, an attempt by the state to require its citizens to communicate a state-sponsored message cannot be sustained, for "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." Barnette, supra, 319 U.S. at 642.

In Tornillo, the Court struck down a

Florida statute requiring a newspaper to publish a political candidate's reply to criticism previously published in that newspaper. The Court held that the state cannot mandate what a newspaper must print: "The Florida statute exacts a penalty on the basis of the content of a newspaper." 418 U.S. at 256 (emphasis added). The Court expressed its concern that a right-of-access statute such as the one in question would eventually lead newspaper editors to avoid its application by refraining from publishing controversial political statements, thereby "dampen[ing] the vigor and limit[ing] the variety of public debate." Id. at 257, quoting New York Times Co. v. Sullivan, 376 U.S. 245, 279 (1964). But even assuming that the free press considerations expressed in Tornillo are applicable to the free speech question here, the Court's concern in Tornillo in ensuring that "the free discussion of governmental affairs" not be stifled (Id.) shows that Tornillo undermines Appellants' position here.

That the present case does not fall within the Barnette-Tornillo-Wooley rubric

is clear. The state is not mandating the content of any speech. No state sponsored message is at issue, nor is Appellants' asserted right to remain "ideologically neutral" jeopardized. Moreover, Appellants themselves are not being forced to espouse any view at all. Since persons may presumably even now shop at Pruneyard wearing political buttons or slogans on their clothes, appellants' argument proves far too much. All that is required by the California Constitution is that Appellants allow others to express themselves, subject to such reasonable regulations as Appellants may wish to promulgate.[13/] Since it was precisely these factors which led this

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13/ The reasonable person would not attribute to the owner of a shopping center the views espoused by persons allowed to engage in expressive activity thereon, particularly since it can be assumed that such activity would encompass a wide variety of divergent views. The Court has never intimated that in public forum cases, municipalities have thereby become the "speaker" of the message expressed. See e.g., Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975).

Court in Barnette, Tornillo and Wooley to invalidate the challenged state statutes on First Amendment grounds, Appellees submit that their absence in this case mandates the opposite result.

CONCLUSION

This Court has never suggested that a state's property laws which permit free speech activity on shopping center grounds could constitute a "taking" without just compensation or a denial of economic substantive due process. Lloyd held only that because of the lack of state action, the First Amendment could not be used as a sword to compel a shopping center to permit expressive activity otherwise forbidden by state law.

The California Supreme Court's decision in this case consists of nothing more than an interpretation of a state constitutional guarantee of free speech and a determination that state property law requires that such rights be accommodated by the owners of shopping centers which have been opened to the public at large.

Under this Court's decisions, this accommodation for the public good raises no substantial federal question. It is not a "taking" within the meaning of the Fifth Amendment, and cannot be invalidated for violation of either economic substantive due process or Appellants' speciously-asserted First Amendment rights.

Accordingly, this Court should dismiss this appeal for lack of jurisdiction or, in the alternative, affirm the decision below.

Respectfully submitted,

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